

CONSTITUTION PROJECT STAFF DOCUMENT

President Obama's executive orders deliberately left open the option to adopt troubling policies regarding the detention, interrogation, and trial of people "accused of terrorism" as well as the possibility of establishing a system of "preventive detention." Administration appointees have suggested an overly-broad definition of "battlefield" that may determine when we may detain our enemies. While the president has indicated that he intends to limit the use of signing statements, he has explicitly left open the possibility that he will refuse to enforce duly-enacted laws, rather than vetoing those with which he disagrees and thus affording Congress the opportunity to override the veto, as the Constitution requires.

The positions of the Justice Department in several pending cases raise additional concerns.

- Justice Department lawyers have defended unconstitutional positions asserted by the Bush administration and asserted other constitutionally dubious views on the state secrets privilege, access to DNA evidence, the rights of Guantanamo detainees, and the definition of so-called "enemy combatants."
- In a case before the U.S. Court of Appeals for the Ninth Circuit, the Department continued to argue that a lawsuit challenging the CIA's extraordinary rendition program must be dismissed because the "very subject matter" of the case was a state secret. The Constitution Project wrote to Attorney General Holder calling upon him to renounce this overbroad position, and consent to a review by the trial judge of which evidence is actually subject to the state secrets privilege.
- The Department argued before the Supreme Court that prisoners have no constitutional right to post-conviction access to evidence such as DNA, even when that evidence could indisputably prove the prisoner's innocence.
- After the Ninth Circuit ruled in a case challenging the NSA's warrantless wiretapping program that the government must permit plaintiffs' lawyers to review a classified surveillance document, Justice Department lawyers filed papers that appeared to defy the judge's order; the Department indicated that if the judge gives access to the secret filings in the case to opposing counsel, the government will "withdraw that information from submission to the Court."
- The Department, relying on a recent troubling opinion by the D.C. Circuit in the case of 17 Uighurs detained at Guantanamo, urged that even for detainees cleared for release, the courts have no power to order that release and must instead await ongoing diplomatic efforts to place these individuals. The Constitution Project has already filed a friend-of-the-court brief in the Uighur case arguing that courts do have the power to order release in *habeas* cases, and will file a similar brief in support of the Uighurs' petition seeking review in the U.S. Supreme Court.
- In a filing submitted to a federal judge overseeing several cases of Guantanamo detainees challenging their detention, the Department abandoned the use of the term "enemy combatant" that was improperly created and relied upon by the previous administration, but the definition of the category remains almost the same. The Department's filing indicates that decisions on detention authority must be made on a case by case basis at Guantanamo, and that it is

engaged in an interagency review to develop a plan to develop “a comprehensive detention policy with respect to individuals captured in connection with armed conflicts and counterterrorism operations.” As the administration develops this policy, it must ensure that it does not claim authority to detain beyond traditional military jurisdiction and laws of war.